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No. 88-505

In the Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL ASSOCIATION OF COUNTIES, ET AL., PETITIONERS

v.

NICHOLAS F. BRADY, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners challenge the ruling of the court of appeals that the Secretary of the Treasury had no authority to disburse to local governments $180 million in Revenue Sharing Trust Funds sequestered by Congress during the final year of the Revenue Sharing Program.

1. The Revenue Sharing Act, 31 U.S.C. 6701 *et seq.* (repealed 1986), established a financial assistance program for local governments authorized through fiscal year (FY) 1986.[1] The payments to the local governments were made

[1] As initially enacted in 1972, the Revenue Sharing Act authorized and appropriated funds for the original five-year duration of the program. Thereafter, the program was reenacted and amended several times to authorize appropriations for several years at a time. See Pub. L. No. 92-512, § 102, 86 Stat. 919; Pub. L. No. 94-488, § 6(e)(1), 90 Stat. 2347; Pub. L. No. 96-604, § 2(c)(1), 94 Stat. 3517; Pub. L. No. 97-258, § 1, 96 Stat. 1012; Pub. L. No. 98-185, §§ 2, 9(a), 97 Stat. 1309, 1311.

through the State and Local Government Fiscal Assistance Trust Fund, of which the Secretary of the Treasury was the trustee (Pet. App. 3a). The Trust Fund was funded entirely by appropriations earmarked for "entitlement period[s]," which coincided with fiscal years (31 U.S.C. 6703(b)). Qualified local governments were awarded a pro rata share of the money appropriated for any given entitlement period (31 U.S.C. 6707-6709). The trustee was authorized to pay out the money appropriated for these entitlement periods beyond the end of the fiscal year (31 U.S.C. 6703(a)(2)).

The last reauthorization of the Revenue Sharing Program expired with the FY 1986 entitlement period. In addition, Congress affirmatively terminated the program in the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, § 14001, 100 Stat. 327, and made provisions for an orderly winding down at the close of the FY 1986 entitlement period.

For the FY 1986 entitlement period, Congress originally authorized $4,566,700,000 for the Trust Fund but subsequently reduced that appropriation to $4,185,000,000. Pub. L. No. 99-160, § 1, 99 Stat. 924. In addition, 4.3% of the $4.185 billion was required to be sequestered pursuant to the so-called "Gramm-Rudman-Hollings" Act. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (codified at 2 U.S.C. (Supp. III) 901 *et seq.*).[2] The $180 million at stake in this case represents the 4.3% sequestered under Gramm-Rudman-Hollings.

Section 256(a)(2) of Gramm-Rudman-Hollings, 2 U.S.C. (Supp. III) 906(a)(2), provides generally that

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[2] After this Court invalidated the President's sequestration order, Congress passed legislation ratifying that order. Pub. L. No. 99-366, 100 Stat. 773.

budget authority required to be sequestered under the act "[is] permanently cancelled." Section 256(a)(2) also provides, however, that amounts sequestered in trust funds "shall remain in such funds and be available in accordance with and to the extent permitted by law." As the court of appeals noted (Pet. App. 16a, 20a), the meaning of that provision is the crux of this case, for it determines whether in fact the $180 million remained appropriated after the trust fund was terminated at the end of the sequestration year.

The Secretary of the Treasury took the position that, because the Revenue Sharing Trust Fund, unlike any other trust fund affected by Gramm-Rudman-Hollings, was terminated with the close of the FY 1986 entitlement period, he had no authority to release the money to the local governments at the end of the sequestration period. Pursuant to Section 14001(a)(2) of COBRA, 100 Stat. 328, he returned the money to the General Fund of the Treasury. Petitioners, several local governments and several organizations of local governments, brought suit seeking an injunction requiring the Secretary to release the funds.

The district court held that the Secretary was required to disburse the funds (Pet. App. 30a-41a). The court reasoned that Section 256(a)(2) of Gramm-Rudman-Hollings had the effect of merely "freezing" the money for one year (Pet. App. 34a). The court found the authority for distributing the money at the end of the sequestration in two provisions: in the Revenue Sharing Act's provision that trust fund monies could generally be paid out after the close of the fiscal year, and in COBRA's provision that all entitlement payments "required to be made" be "completely made" before any remaining monies revert to the Treasury (*id.* at 35a, 38a).

2. The court of appeals unanimously reversed. The court first looked to the plain language of Section 256(a)

(2), agreeing with the district court that the monies sequestered in trust funds were to remain "available," but finding that the "dispositive issue," which the district court failed to address, was whether the funds remained available beyond the expiration of FY 1986 (Pet. App. 15a-17a, 20a-21a). The court interpreted the language that the funds remain " 'available in accordance with and to the extent permitted by law' " as "requiring the funds to remain available in the applicable Trust Fund as FY 87 budgetary resources," which could be spent only if some "independent source of legislation" applicable to FY 1987 authorized its expenditure (*id.* at 16a-17a). The court then concluded that, "[s]ince COBRA repealed the Revenue Sharing Act and its programs, the Secretary has no FY 87 authority to disburse the sequestered funds" (*id.* at 17a).

The court of appeals found its reading of Section 256(a)(2) consistent with the limited available legislative history and with interpretations of Section 256(a)(2) rendered by both the Comptroller General and the Office of Management and Budget (Pet. App. 19a-20a, 23a-25a). The court also found its reading the "only plausible interpretation" in view of Gramm-Rudman-Hollings' goal of reducing the deficit (*id.* at 17a-18a) and noted that, for trust funds other than the terminated Revenue Sharing Trust Fund, the sequestered funds would not be lost, but would be carried forward as FY 1987 budgetary resources (*id.* at 18a-19a).

Finally, the court of appeals found inapplicable all of the provisions of the Revenue Sharing Act or COBRA relied on by petitioners and the district court, because those provisions merely mandated the release of monies that in fact remained appropriated for the Trust Fund (Pet. App. 21a-22a). The court held that the Secretary fully executed his duties as trustee by releasing to the local governments "their entire FY 86 entitlements—4.185 billion minus the

4.3% *reduction* mandated by Gramm-Rudman-Hollings" and that he did "the only thing that he could do," which was to return the $180 million to the General Fund of the Treasury, as authorized by COBRA (*id.* at 21a).

3. The decision of the court of appeals is correct, has little if any prospective significance, and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

Petitioners urge on this Court an inapplicable legal standard and are thus simply wrong in asserting that the decision below conflicts with prior rulings of this Court. The issue in *Train* v. *City of New York*, 420 U.S. 35 (1975), and *State Highway Comm'n* v. *Volpe*, 479 F.2d 1099 (8th Cir. 1973), the so-called "impoundment" cases on which petitioners chiefly rely, was whether Congress had intended to give the Executive Branch discretion to spend less than the entire amount Congress had appropriated for a program.[3] In the present case, the issue is whether Congress in fact appropriated the funds; the Secretary has never sought to assert any discretionary authority with regard to the funds. Indeed, the Secretary's consistent position has been that he had no choice but to return the $180 million to the General Treasury, because the provisions in the three statutes involved in this case effected a congressional cancellation of any appropriations

[3] Similarly, the issue in *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), was whether Congress intended to confer discretion on the Executive not to follow the decision of an arbitrator to whom Congress had delegated the spending decison. The decision in *City of New Haven* v. *United States*, 809 F.2d 900 (D.C. Cir. 1987), is concerned solely with Congress's intent in passing the Impoundment Control Act of 1974, 2 U.S.C. 683, 684, and is thus of no aid in this case except as a reminder that, if this case really involved an issue of discretionary spending, petitioners certainly would have argued that the Impoundment Control Act was violated.

authorizing disbursement of the funds; the money was withdrawn by operation of law.

Because the true issue in this case was whether Congress intended the $180 million to remain appropriated, and not whether the Secretary had discretion with regard to unquestionably appropriated funds, this case presented to the court of appeals an ordinary statutory construction problem. The court answered that problem by correctly turning to traditional statutory construction principles and correctly rejected petitioners' proffered legal standard.[4] See *United States* v. *Will*, 449 U.S. 200, 221-224 (1980) (in determining whether Congress had in fact repealed previously enacted salary increases, the Court looked to language of the statute and its legislative history to discern intent); *City of Los Angeles* v. *Adams*, 556 F.2d 40, 47 (D.C. Cir. 1977) (in determining whether Congress had in fact decreased its original appropriation, the court looked to the plain meaning of the statute, the legislative history, and the "absurdity" of a contrary construction).[5]

Petitioners suggest (Pet. 12) that the court of appeals inappropriately deferred to the agency interpretation of the statutes at issue under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). But the court of appeals explicitly de-

[4] In any event, we do not believe that *Train* and *Volpe* establish the principle petitioners assert regarding the need for an "express" congressional command before an intent to grant discretion to the Executive will be found. Indeed, *Volpe* held that Congress had not "expressly or impliedly" given discretion to the Executive to withhold funds (479 F.2d at 1118).

[5] In language equally applicable to this case, the *City of Los Angeles* court noted (556 F.2d at 49 & n.21, citing *Train*, *Volpe*, and other "impoundment" cases) that the case before it did "not involve independent refusal by the Executive or agency to spend the amounts that Congress has required. * * * This was not executive 'impoundment' of the legislative appropriations; it was a congressional reduction – if an impoundment at all, an impoundment by statute."

clined to decide "the extent to which we should defer, if at all, to the Secretary's interpretation" (Pet. App. 23a). In any case, there would have been nothing inappropriate about applying *Chevron* deference to this funding dispute.[6]

Petitioners' citation (Pet. 10) of "repeal by implication" cases is similarly inapposite. Two of the cases[7] addressed the asserted repeal of a substantive measure by way of an appropriations act, an especially disfavored statutory construction, whereas this case involves the reduction of a previous appropriation by a later appropriations measure. A third case, *United States* v. *Will, supra,* which involved a reduction in previously enacted salary increases, actually supports the court of appeals here: "[W]hen Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.' * * * 'The whole question depends on the intention of Congress as expressed in the statutes.' " 449 U.S. at 222 (citations

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[6] In the portion of its opinion that noted the consistency of the court's result with administrative interpretations of the statutes at issue (Pet. App. 23a-25a), the court of appeals did not look to the Secretary's interpretation but to those of the Office of Management and Budget and the Comptroller General. The latter is an official of the Legislative Branch, not the Executive (see *Bowsher* v. *Synar,* 478 U.S. 714, 727-732 (1986)), and his interpretation agrees with that of the relevant Executive Branch officials. Petitioners' misconceived assertions that this case involves "a conflict between Congress and the Executive Branch" (Pet. 12) and that "the court of appeals gave weight to the *Secretary's* interpretation" (*ibid.* (emphasis added)) thus serve only to obscure the real issues in this case.

[7] *TVA* v. *Hill,* 437 U.S. 153 (1978) (snail darter's designation as an endangered species not impliedly repealed by appropriations for completion of dam); *Demby* v. *Schweiker,* 671 F.2d 507 (D.C. Cir. 1981) (substantive formula for distribution of funds not impliedly repealed by appropriations measure reducing total amount available).

omitted).[8] The "repeal by implication" doctrine—which involves gleaning whether Congress implicitly intended by way of a later, assertedly inconsistent statute to affect an earlier measure—has no real application to this case, in which the court interpreted statutory language explicitly intended to affect an earlier measure in order to discern the *manner* in which the earlier measure was affected.

Finally, petitioners gain nothing by their citation (Pet. 10-11) of *United States* v. *Larionoff,* 431 U.S. 864 (1977), for the proposition that constitutional problems would be presented by congressional reduction of an "entitlement" benefit. Here, petitioners have not presented a constitutional challenge, and, by not challenging Congress's initial reduction in the FY 1986 appropriation from $4.566 billion to $4.185 billion (after the beginning of FY 1986), they have in essence conceded that no "entitlement" to Revenue Sharing Trust Funds attaches except as to the pro rata share of monies actually appropriated. See 31 U.S.C. 6702(a), 6703(b), 6707-6709. As the court of appeals noted (Pet. App. 17a n.7), petitioners' "entitlement" argument "begs the question," because the issue in this case concerns how much money in fact remained appropriated and available for payment of the "entitlements." [9]

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[8] The fourth case, *United States* v. *Borden Co.,* 308 U.S. 188 (1939), does not deal with appropriations at all, but rather with the extent to which subsequent substantive law will be read to repeal by implication earlier substantive law.

[9] Petitioners fault the court of appeals for not addressing what they label the "savings provision" (Pet. 8) of Gramm-Rudman-Hollings, *i.e.,* Section 255(g)(1), 2 U.S.C. (Supp. III) 905(g)(1), which exempted from sequestration (along with other accounts) the "Payments to state and local government assistance trust fund (20-2111-0-1-851)." Petitioners elsewhere (Pet. 4, 11, 13) cite the provision as evidence that Congress accorded special treatment to the Revenue Sharing Trust Fund, leaving the impression that possibly the Trust Fund was to have

The decision of the court of appeals also announced no generally applicable legal principles and has little if any prospective importance. The Revenue Sharing Program has been terminated, and the court's statutory construction of Gramm-Rudman-Hollings would be relevant in a future case only if (1) sequestration is again required for trust funds, and (2) the sequestration applies to a particular trust fund that has been terminated independently of the sequestration law.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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been exempt from sequestration altogether. But petitioners conceded below that the Trust Fund was subject to sequestration (Pet. App. 15a n.6, 31a n.2) and they are attempting now to confuse the issue. As explained to Congress by Treasury officials, Section 255(g)(1)'s provision was necessary because of a peculiar accounting device. *Hearings on H.R. 5313 Before a Subcomm. of the Senate Comm. on Appropriations*, 99th Cong., 2d Sess. 481-482 (1986). Since the Fund has no source of revenue other than appropriations, there were two line accounts for administering the Trust Fund: the "payments to" the Revenue Sharing Trust Fund and the Trust Fund itself. If Congress had not exempted the first from sequestration, there would have been a double sequestration (*ibid.*).

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